

STATE OF MICHIGAN
IN THE SUPREME COURT

FRASER TREBILCOCK DAVIS & DUNLAP, P.C.

Plaintiff-Appellee

Case No. 148931, 148932, 148933

V

Court of Appeals Docket No.
302835, 305149, and 3007002

BOYCE TRUST 2350, BOYCE TRUST 3649, and
BOYCE TRUST 3650

Midland County Circuit Court No.
09-006135-CZ

Defendant- Appellant

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**DEFENDANT-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF ITS
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF ORDER APPEALED FROM AND REQUEST FOR RELIEF

Defendant Boyce Trust 2350, Boyce Trust 3649 and Boyce Trust 3650 (hereafter “Boyce Trusts”) hereby appeal the Opinion of the Michigan Court of Appeals issued February 6, 2014. Boyce Trusts requests that this Court reverse the opinion of the Court of Appeals which conflicts with the dissenting opinion of Chief Judge Murphy. Boyce Trust requests that this Court adopt the result consistent with Judge Murphy’s dissent, whether by adopting his reasoning or on another basis. Boyce Trusts requests that this Court order that Plaintiff is not entitled to any case evaluation sanctions.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err by holding that the Plaintiff law firm was entitled to collect case evaluation sanction when it represented itself in the underlying case?

Defendant-Appellant answers “Yes”

Plaintiff- Appellee answers “No”

**DEFENDANT/APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF ITS
APPLICATION FOR LEAVE TO APPEAL**

GROUND FOR APPLICATION FOR LEAVE TO APPEAL

Pursuant to the Court's direction in the Court's October 1, 2014 order to not submit mere restatements of the application papers, Defendants/Appellants affirmatively state that it relies on its previously filed application papers regarding the grounds for application for leave to appeal.

STATEMENT OF FACTS

Pursuant to the Court's direction in the Court's October 1, 2014 order to not submit mere restatements of the application papers, Defendants/Appellants affirmatively state that it relies on its previously filed application papers regarding the statement of facts.

ARGUMENT

- I. **WHERE A LAW FIRM REPRESENTS ITSELF IN A COLLECTION CASE, IT IS NOT ENTITLED TO CASE EVALUATION SANCTIONS FOR THE REASON THAT IT DOES NOT HAVE AN ATTORNEY-CLIENT RELATIONSHIP AND APPEARS PRO PER AND BECAUSE IT DOES NOT INCUR ATTORNEY FEES.**

Standard of Review

Defendants/Appellants affirmatively states that it relies upon the standard of review as previously submitted in this matter.

Argument

As an initial observation, Defendants/Appellants rely on the law previously submitted in this matter in both its application for leave to appeal and the reply brief in support of the application for leave to appeal. This filing shall present additional case law arising subsequent to the filing of the original briefs.

On July 22, 2014, the Michigan Court of Appeals issued an unpublished decision in the case of *Payne Broder & Fossee, P.C. v Shefman*.¹ Therein, the Court considered whether an attorney collecting a debt could recover contractual attorney fees. The Court unanimously found that the attorney plaintiff could do so. In doing so, the court drew a distinction between contractual based attorney fees and case evaluation sanctions as described in *Watkins v Manchester*.² Appellants suggest the majority decision is of no particular consequence to the Court's inquiry in this matter.

However, Chief Judge Murphy authored a concurrence to specifically point out that his position in the *Shefman* case "is not at odds or in conflict with" his partial dissent in this matter. By doing so, Chief Judge Murphy reconfirmed his partial dissent in this matter. Judge Donofrio specifically concurred with Chief Judge Murphy in what can be interpreted as additional support for Chief Judge Murphy's position in this matter.

This summer a case arising in Arizona issued a very instructive decision in a closely similar circumstance. In *Munger Chadwick PLLC v Farwest Development and Construction of the Southwest, LLC*,³ the Court considered a law firm's request for attorney fees under a fee shifting statute with similar objectives as Michigan's case evaluation statute.⁴ The Court found

¹ Michigan Court of Appeals Docket number 312659

² 220 Mich App 337; 559 NW2d 81 (1996)

³ 235 Ariz. 125, 329 P.3d 229 (Ariz. Ct. App. 2014)

⁴ The Arizona statute reads:

A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees. If a written settlement offer is rejected and the judgment finally obtained is equal to or more favorable to the offeror than an offer made in writing to settle any contested action arising out of a contract, the offeror is deemed to be the successful party from the date of the offer and the court may award the successful party reasonable attorney fees. This section shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees.

B. The award of reasonable attorney fees pursuant to this section should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid or agreed to be paid.

C. The court and not a jury shall award reasonable attorney fees under this section

“no logical reason to draw any distinction between a law firm that represents itself and a sole practitioner that does so.”⁵ . In reaching the decision to deny the law firm requested fees, the court pointed out that “the rules governing attorney conduct also contemplate law firms representing clients.” *Id* at 231. When a lawyer associated with a law firm is hired, the law firm assumes the authority and responsibility of representing the client.

The Court likewise looked to rules regarding unauthorized practice of law in support of its conclusion and that the law referred to “entities” practicing law. So too, Michigan law provides that Professional Corporations are entitled to practice law in Michigan provided each shareholder is a licensed professional.⁶

The *Munger* court echoed the rationale for denying fees set forth by other courts:

In applying the rule, our courts have expressed a core concern that all parties to litigation be treated equally in their ability to secure compensation for attorney fees. This court has specifically reasoned that an attorney ought not be entitled to compensation for her time in representing herself when a lay person would not be able to do so. We likewise conclude it would be inequitable for a law firm to be able to obtain its fees through an arrangement that amounts to self-representation when a sole practitioner would be unable to do so. And, as we have previously observed, to grant fees to parties appearing pro se will ... create incentives to protract and delay litigation. It may well foster litigation over specious claims and in many cases the prospect of a fee award could well be the principal motivating factor behind a lawsuit. In particular, the leverage which would be granted to attorneys appearing on their own behalf could easily become oppressive where the opposition is forced to incur legal expenses. None of these concerns are mitigated by allowing a law firm to “hire” its own attorneys as if they were outside counsel.⁷

The *Munger* decision is well-reasoned and the same rationale applies with equal force in this matter. In all other respects, Defendants/Appellants rely on their previous filings.

Ariz. Rev. Stat. Ann. § 12-341.01

⁵⁵ *Munger*, at 232

⁶ MCLA 450.224(2).

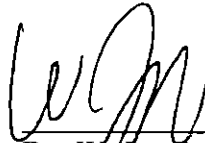
⁷ *Munger Chadwick, P.L.C. v. Farwest Dev. & Const. of the Sw., LLC*, 235 Ariz. 125, 329 P.3d 229, 232 (Ariz. Ct. App. 2014) (citing *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App.1983)).

CONCLUSION AND REQUEST FOR RELIEF

Given that this matter has been fully briefed on multiple occasions, Defendants/Appellants do not believe further briefing in this matter will provide the Court with any further benefit in deciding the question before it. Defendants/Appellants request that the Court, in lieu of granting full leave to appeal, use its power under MCR 7.302(H)(1) to issue a final decision in this matter. Specifically, Defendants/Appellants request adopt the partial dissenting opinion of Chief Judge Murphy and hold that the Plaintiff/Appellee is not entitled to case evaluation sanctions.

Dated: November 7, 2014

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